

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

344 PROVIDENCE ROAD REALTY
TRUST, RICHARD J. WUNSCHEL,
and NAUTILUS INSURANCE COMPANY,

Plaintiffs and Counterclaim Defendants,

v.

AMERICAN SAFETY RISK RETENTION
GROUP, INC.

Defendant and
Cross-claim and Counterclaim Plaintiff, and

ARCHITECTURAL DELEADING, INC.,

Defendant, Cross-claim Defendant, and
Counterclaim Plaintiff

CIVIL ACTION NO. 04-40197-FDS

**PLAINTIFFS' MOTION TO DISMISS AMENDED COUNTERCLAIM OF
ARCHITECTURAL DELEADING, INC.**

Plaintiffs and Counterclaim Defendants 344 Providence Road Realty Trust ("Realty Trust"), Richard J. Wunschel ("Wunschel"), and Nautilus Insurance Company ("Nautilus") (collectively Plaintiffs or Wunschel) move pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss the Amended Counterclaim of Architectural Deleading, Inc. ("ADI") for failure to state a claim upon which relief can be granted. ADI counterclaims that Wunschel, the Realty Trust, and Nautilus together or separately must indemnify it for the costs of its defense and settlement of a wrongful death action prosecuted against ADI, Wunschel and the Realty Trust in Massachusetts state court. ADI makes no claim based upon an express indemnity contract as have Plaintiffs in Count I of the Amended Complaint, but instead claims common law indemnity because its negligence in causing the death was "passive and constructive" while the alleged

negligence of Wunschel and the Realty Trust, in which it “did not participate,” was “active and actual.” (Amended Counterclaim of ADI, ¶ 7.) The Supreme Judicial Court of Massachusetts has rejected the doctrine of active-passive negligence as a basis for imposing common law indemnity and the existence of an express indemnity contract in favor of Plaintiffs precludes relief on any implied contract of indemnity theory. For these reasons and those set forth more fully in the accompanying memorandum, ADI’s amended counterclaim should be dismissed.

Local Rule 7.1(A)(2) Certification

The undersigned certifies that he has conferred in good faith with counsel for Architectural Deleading, Inc., pursuant to Local Rule 7.1(A)(2) but has been unable to resolve these issues.

Respectfully submitted,

344 PROVIDENCE ROAD REALTY TRUST
RICHARD J. WUNSCHEL, and
NAUTILUS INSURANCE COMPANY

By their attorneys,

/s/ Matthew J. Walko

/s/ Christina Schenk-Hargrove

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